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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ODILON WENCES-CRUZ,

Defendant and Appellant.

B214338

(Los Angeles County
Super. Ct. No. TA053332)

APPEAL from an order after judgment of the Superior Court of Los Angeles County, Sharon L. Miller, Judge. Affirmed.

Karlin & Karlin and Marc A. Karlin for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Lance E. Winters, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Odilon Wences-Cruz appeals from the denial of his motion to vacate the judgment and withdraw his plea of guilty to one count of discharging a firearm in a grossly negligent manner, and one count of inflicting corporal injury on a spouse or cohabitant. Appellant argues that the trial court erred in denying his motion because he was not advised of the immigration consequences of his plea as required by Penal Code section 1016.5.¹ We find that the advisement complied with the requirements of section 1016.5, and therefore affirm the trial court's order denying the motion to vacate.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant and Maria Acevedo Garcia lived together and had three children. On April 1, 1999, appellant and Garcia got into an argument because appellant was drunk and wanted to go out, but Garcia would not give him the keys. Appellant pushed Garcia against a wall twice. Garcia then told appellant to leave. Appellant responded by pouring gasoline onto a pile of his clothing and firing a semi-automatic gun into the pile of clothing.

On April 5, 1999, appellant was charged by felony complaint with discharging a firearm in a grossly negligent manner, a felony (§ 246.3), and with inflicting corporal injury on a spouse, cohabitant, or child's parent, a misdemeanor (§ 273.5, subd. (a).) Appellant pleaded not guilty.

The court granted the prosecution's motion to amend the complaint to allege both offenses as misdemeanors. On April 19, 1999, appellant withdrew his not guilty pleas, and after waiving his constitutional rights, entered pleas of guilty to

¹ All undesignated statutory references are to the Penal Code.

both counts. The court suspended imposition of sentence, and granted appellant summary probation for 36 months.

On December 1, 2008, appellant filed a motion to vacate his conviction on the basis that he was not given proper advisements regarding the immigration consequences at the time of his guilty plea, as required by section 1016.5. The court denied appellant's motion to vacate the judgment of conviction.

This timely appeal followed.

DISCUSSION

I. The Advisement Was Properly Given

Procedural Background

At the time appellant filed his motion to vacate his conviction, a transcript of the hearing of April 19, 1999 was not available. The computer storage disk on which the court reporter had stored a copy of the hearing transcript had been damaged and could not be read. Appellant submitted a declaration stating that he did not recall the court, or his attorney, ever explaining to him when he pleaded guilty that he would have no opportunity to stay in the United States, and that his guilty plea would foreclose any possibility of his obtaining immigration relief. He was assisted by a Spanish language interpreter on April 19, 1999, and he did not recall the interpreter explaining to him the immigration consequences of his guilty pleas.

By the time appellant's motion to vacate the judgment of conviction was heard, the court reporter had been able to prepare and submit a transcript of the April 19, 1999 hearing, based on her paper notes from the hearing.

The reporter's transcript of the hearing of April 19, 1999 indicates that the court told appellant that before accepting his plea, the court was required to advise

him of his constitutional rights, including the right to a speedy trial, to confront witnesses, and to remain silent. The court inquired whether appellant understood what the court had said, and whether he had any questions, and appellant acknowledged that he understood and had no questions. He stated that he waived his constitutional rights.

The court continued: “Sir, if you are not a citizen of the United States, your plea here today will cause you to be deported from the United States, excluded from admission, or denied naturalization or amnesty pursuant to the laws of the United States.” The court then explained that if appellant was on probation or parole on other matters, a plea could result in the imposition of additional sanctions. The court informed appellant that he would have to pay a restitution fine. The court then asked if appellant had any questions, and he replied, “No.” The court proceeded to take appellant’s guilty pleas. Defense counsel joined in the waivers, concurred in the plea, and stipulated to a factual basis for the pleas. The court suspended imposition of sentence, and granted appellant summary probation.

Discussion

Section 1016.5, subdivision (a) provides: “Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant: [¶] If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.” Section 1016.5, subdivision (b) directs the court to vacate any plea taken without the advisement when the defendant shows that the plea may have the

adverse consequences described by the statute. (*People v. Gutierrez* (2003) 106 Cal.App.4th 169, 173 (*Gutierrez*).)

“To prevail on a motion to vacate under section 1016.5, a defendant must establish that (1) he or she was not properly advised of the immigration consequences as provided by the statute; (2) there exists, at the time of the motion, more than a remote possibility that the conviction will have one or more of the specified adverse immigration consequences; and (3) he or she was prejudiced by the nonadvisement. [Citations.]” (*People v. Totari* (2002) 28 Cal.4th 876, 884.) We review the trial court’s denial of a motion to vacate the judgment for abuse of discretion. (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192 (*Zamudio*).)

Appellant was properly advised of the immigration consequences. The court told him that if he was not a citizen, his guilty plea “*will* cause you to be deported from the United States, excluded from admission, or denied naturalization or amnesty pursuant to the laws of the United States.” (Italics added.) The advisement was definitive, even more so than the statutory language that conviction “*may* have the consequences of deportation, exclusion from admission . . . , or denial of naturalization.” (§ 1016.5, subd. (a), italics added.)

A trial court’s advisement of the immigration consequences of a guilty or nolo contendere plea need not literally comply with the advisement set out in section 1016.5. (*Gutierrez, supra*, 106 Cal.App.4th at pp. 173-174; see *Zamudio, supra*, 23 Cal.4th at p. 208.) Rather, an immigration advisement need only substantially comply with section 1016.5. (*Gutierrez, supra*, 106 Cal.App.4th at pp. 173-174; see *Zamudio, supra*, 23 Cal.4th at p. 208.) Here, the court’s advisement substantially complied with section 1016.5 and, indeed, more

conclusively indicated that the conviction would result in adverse immigration consequences.

As appellant has failed to establish that he was not properly advised of the immigration consequences of his plea, we need not address his claim of prejudice.

II. Knowing and Voluntary Waiver of Rights

Appellant argues that his motion to vacate the conviction must be granted because his decision to accept the plea was not made knowingly or voluntarily. Citing *People v. Howard* (1992) 1 Cal.4th 1132, 1174-1180, appellant argues that “any valid guilty plea must be made with a knowledge of the fundamental constitutional rights involved and the direct penal consequences of the guilty plea, and the defendant’s expressed desire to waive his or her constitutional rights.”

In order for a defendant’s plea to be knowing and voluntary, due process requires only that the defendant be advised of and waive his constitutional rights to trial, to confront witnesses, and to stand silent before entering his plea. (*People v. Mosby* (2004) 33 Cal.4th 353, 359.) Appellant was advised of and waived those rights before entering his plea. The immigration consequences of a plea are “collateral” consequences of a criminal conviction in California. (*Zamudio, supra*, 23 Cal.4th at p. 198.) The lack of an express acknowledgment by appellant of the immigration consequences of the plea did not render appellant’s plea involuntary. Section 1016.5 requires that the court advise a defendant of potential immigration consequences before accepting a guilty plea, but does not require that the court obtain an express acknowledgment as to the immigration consequences. In any event, shortly after advising appellant of the immigration consequences of his plea, the court asked whether he had any questions, and he said he did not. We find no

abuse of discretion in the trial court's denial of appellant's motion to vacate pursuant to section 1016.5.

DISPOSITION

The order is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.